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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: NOV 01 2013

OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Nebraska Service Center, (director) and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a designer and manufacturer of automotive sound systems and related software. It seeks to employ the beneficiary permanently in the United States as a senior mechanical design engineer – Korean accounts. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification) approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. Accordingly, on April 29, 2013, the director denied the petition.

The record shows that counsel for the petitioner submits a brief and additional evidence properly and timely and requests approval of the petition. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision, an issue in this case is whether or not the petitioner has demonstrated that the beneficiary held a U.S. bachelor's degree or foreign equivalent in mechanical engineering and three years of experience or alternatively possessed the equivalent combination of education, training, and experience in the job offered prior to the priority date as set forth on the ETA Form 9089.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted with a brief on appeal.¹

On appeal, counsel submits copies of recruitment documents and a legal brief to support his assertions. Other relevant evidence in the record includes the beneficiary's Certificate of Graduation and official transcript from [REDACTED] Korea, for a two-year Machine Design program the beneficiary completed at the university on February 2, 1991; "Certificate[s] of Career" from [REDACTED] in South Korea, and [REDACTED] in South Korea, and [REDACTED] in South Korea; a credentials evaluation from [REDACTED] and three experience letters from previous employers verifying the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary's experience as an automotive sound systems design engineer from November 1995 to July 2008. The record also includes job postings by the petitioner for the proffered position.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. See 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. See 8 C.F.R. § 204.5(l)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and that the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, United States Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

A labor certification is an integral part of this petition, but the issuance of an ETA Form 9089 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See 8 C.F.R. § 103.2(b)(1), (12). See also *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree.
- H.4B. Major field of study: 'Mechanical Engineering or related.'
- H.5. Training: None required.
- H.6. Experience in the job offered: 36 months.
- H.7. Alternate field of study that is acceptable: None accepted.
- H.8. Alternate combination of education and experience: Accepted.
- H.8A. Alternate level of education required: Other.
- H.8B. Alternate level of education required: 'Will accept an equivalent combination of education and experience in lieu of stated degree and experience requirements.'
- H.8C. Number of years experience accepted: 0.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternative occupation: Accepted.
- H.10A. Number of months required in alternate occupation: 36.
- H.10B. Job title of an alternative occupation: Senior Mechanical Engineer, Design Engineer, or related.
- H.11. Job duties:
 - Engineering, development, analysis and improvement of product designs using various computer-aided design tools such as CATIA V5, CAD software and FEA software; Develop advanced acoustic product designs in cooperation with the appropriate engineering disciplines and technicians according to customer and federal regulations and specifications; Use CATIA Version 5 (Revision 18 or higher) CAD software at a highly skilled level to develop product concepts and designs of Harman/Becker systems and components; Create 3D models, assembly drawings and component drawings of product designs using proper drafting, dimensioning and tolerancing techniques, such as [REDACTED] Provide technical support to Korean customers [REDACTED] and Harman Korea engineering team. Analyze product designs with consideration to customer requirements and supplier capabilities and with regards to cost and timing to ensure manufacturability, efficiency and quality; use computer tools such as finite element analysis (FEA) to confirm design

integrity; Apply techniques such as DFMEA and/or DRBRM analysis to identify and assess design and manufacturing risks; Develop plans to validate the robustness of product designs; Prepare technical reports and presentations for appropriate employees and customers, as well as department managers as required; Create and release appropriate engineering documentation; Investigate and analyze appropriate data to verify intent and compliance of designs to customer specifications and requirements; Direct and monitor the activities of less experienced mechanical design engineers, providing leadership and mentorship to other team members; Lead internal design reviews with peers to ensure that new product designs are compliant to 'Best Practices' and 'lessons learned' requirements.

Part J of the labor certification states that the beneficiary possesses an associate's degree in Mechanical Design from [REDACTED] Seoul, Korea, in 1991.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In this case, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking classification pursuant to section 203(b)(3)(A)(i) of the Act by checking box f in Part 2 of the I-140 form. The box f is for a skilled worker. The director evaluated the proffered position as requiring a minimum of a bachelor's degree. As the beneficiary does not possess a bachelor's degree, the director denied the petition.

As noted above, the Form 9089 in this matter is certified by DOL. At the outset, DOL's certification of the ETA Form 9089 does not supercede USCIS review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(1)(3). USCIS has authority to evaluate whether the alien is eligible for the classification sought and has authority to evaluate whether the alien is qualified for the job offered.

In the instant case, the labor certification states that the proffered position requires a bachelor's degree in mechanical engineering or a related field and three years of experience in the offered position or three years of experience in the position of Senior Mechanical Engineer, Design Engineer, or related. The petitioner indicates at Line 8 that a job candidate could meet the minimum

requirements with an equivalent combination of education and experience in lieu of the stated degree and experience requirements. However, the petitioner did not clarify at Line 8-B what type of alternate degree would be acceptable in place of a bachelor's degree. The petitioner did specify at Line 8-C that it would accept a candidate with no experience, whatsoever.

To establish that the beneficiary meets the educational requirements stated on the labor certification, the petitioner submitted a credential evaluation from Foundation for International Service, Inc., which concludes that the beneficiary's combination of accredited post-secondary study (two-year degree program from Induk University in machine design) and his related work experience is equivalent to the completion of a bachelor's degree in mechanical engineering technology from a regionally accredited college or university in the United States.

On appeal, counsel asserts that the language at Lines H-8B and H-14 of the labor certification confirms that the petitioner would accept the equivalent of a bachelor's degree based on any equivalent combination of education, experience, or training in the field. Counsel asserts that a DOL Board of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition (*Francis Kellogg*, 94-INA-465 (BALCA 1998)). Counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions: 8 C.F.R. § 103.9(a). Further, the language cited by counsel is required by the DOL regulations at 20 CFR § 656.17(h)(4)(ii):

If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training or experience is acceptable.

Counsel's assertion that the alternative requirements for the proffered position are specified at Lines H-8B and H-14 is not supported by the labor certification. The fact that the petitioner stated on the ETA Form 9089 that it would "accept an equivalent combination of education and experience" does not assist the AAO in identifying how the petitioner defined the alternative requirements to other potential candidates for the job. The petitioner's alternative requirements stated in Item H-8C expressly indicate its intent to accept less than three years of experience for the proffered position. Specifically, the petitioner states in Item H-8C that it will accept a candidate with no experience.

On appeal, counsel contends that the director erred in not taking into consideration the reports which evaluate the beneficiary's education and experience as equivalent to a U.S. bachelor's degree in mechanical engineering, and in finding that the petitioner has not demonstrated that the beneficiary met the minimum requirements of the Form 9089. Counsel asserts that the evaluation shows that the beneficiary meets the minimum requirements of the labor certification because he has earned the equivalent of a bachelor's degree in mechanical engineering technology through a combination of education and work experience.

The credentials evaluation from the Foundation for International Service, Inc., states that the beneficiary's combination of accredited post-secondary study in mechanical engineering technology and his over ten years experience in the related field is equivalent to the completion of a bachelor's degree in mechanical engineering technology from a regional accredited technical college in the United States.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). See also *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The evaluation in the record equates three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). The labor certification required the beneficiary to have a bachelor's degree in Mechanical Engineering or related field. The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

The record includes recruitment efforts conducted related to the relevant labor certification, including the internal posting notice, newspaper advertisements and internet job posting. These recruitment documents do state that in lieu of a bachelor's degree, a suitable combination of education and work experience will be accepted. However, neither the labor certification nor the postings provide a definition of the "suitable combination" specific enough to apprise U.S. workers of the actual minimum requirements for the offered position.

Contrary to counsel's contention, the petitioner has not demonstrated that the beneficiary met the minimum requirement of the labor certification. The evaluation does not establish that the beneficiary met the minimum requirement of the labor certification as he has not earned a bachelor's degree in mechanical engineering or a related field and the labor certification, itself, did not define the requirements for an acceptable alternative to the required bachelor's degree. Accordingly, the director's decision will be affirmed.

Beyond the decision of the director, the record also reveals that the petition was filed in the wrong category. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Here, the Form I-140 was filed on December 20, 2012. On Part 2.f. of the Form I-140, the petitioner indicated that it was filing the petition for a skilled worker (requiring at least two years training or experience).

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, on the labor certification at Lines H.8, H.8-A, H.8-B, and H.8-C, the petitioner indicates that applicants may qualify through a combination of education and experience. However, the petitioner does not indicate that at least two years of college education is required, and indicates that a candidate can qualify with no work experience at all. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence submitted does not establish that the petition requires at least two years of training or experience. Therefore, the offered job does not satisfy the requirements for classification as a skilled worker position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.